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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 721

JEPSON L. NELSON AND CHARLES W. REEVES, PETITIONERS

v.

LOUIS JOHNSON, SECRETARY OF NATIONAL DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The orders of the District Court, granting petitioners' cross-motions for summary judgments, are not reported (R. 58-59, 65-66). The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported (R. 69-70).

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1950 (R. 71). The petition for a writ of certiorari was filed on March 30, 1950.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioners, who are civilian employees of the Navy Department and also veterans of World War I, were demoted from supervisory positions to jobs of lower rank and pay. They allege that the demotions violate their statutory veterans' preference rights inasmuch as non-veterans were retained in the supervisory positions.

The only question presented is whether petitioners, prior to seeking judicial relief for the alleged violation of their rights, must exhaust their administrative remedies before the Civil Service Commission.

STATUTE INVOLVED

Section 14 of the Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended, 61 Stat. 723 (5 U.S.C., Supp. II, 863) is set forth in the Appendix, *infra*, pp. 12-13.

STATEMENT

Petitioners, veterans of World War I, are civilian employees of the Navy Department, employed in the Philadelphia Naval Shipyard. During March, 1948, they were notified that effective May 17, 1948, they would be demoted from their supervisory positions to jobs of lower rank and pay (R. 38, 39, 44, 60, 61-62). The demotions were proposed after a comparison of petitioners' qualifications with those of competing employees and a determination that their demotions would

promote the efficiency of the service (R. 41, 44, 63). Petitioners appealed to the Civil Service Commission in accordance with the prescribed procedure made available to war veterans.[1]

On April 8, 1948, and while these appeals were pending, petitioners brought the instant actions against respondents (the Secretary of the Navy and the Secretary of Defense) for preliminary and permanent injunctions to restrain the proposed demotions (R. 37-43, 59-65). The gist of the complaints was that the proposed demotions violated their rights under the Act of August 23, 1912, 37 Stat. 360, 413, as amended, and the Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended, because nonveterans were being retained in similar positions (R. 40, 62). After hearing petitioners' requests for preliminary injunctions on May 10, 1948, the District Court, concluding that the proposed demotions would not result in irreparable injury, denied interim injunctive relief (R. 58). Petitioners were demoted on May 17, 1948 (R. 56).

Thereafter, petitioners and respondents moved for summary judgment. The District Court, on October 18, 1948, granted petitioners' motions and

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[1] The record shows that petitioner Nelson "availed himself of the right of appeal to the United States Civil Service Commission" (R. 56). Since the record also stipulates that all evidence pertaining to Nelson pertains to petitioner Reeves as well (R. 67-68), it must be presumed that Reeves also appealed to the Commission. The court below so ruled (R. 70).

directed respondents to restore petitioners, as of May 17, 1948, to the positions from which they had been demoted on that date (R. 59, 66).

On appeal, the Court of Appeals, in a *per curiam* opinion, reversed on the ground that petitioners had failed to exhaust their administrative remedies before filing suit (R. 70).

ARGUMENT

The holding of the court below does no more than require a civil servant, who seeks reinstatement to a supervisory position from which he has been demoted in alleged violation of his veteran's preference rights, to exhaust administrative remedies available to him before the Civil Service Commission prior to seeking judicial intervention. Strictly speaking, this holding conflicts with one aspect of a decision of the Court of Appeals for the First Circuit in the same field (*Wettre* v. *Hague*, 168 F 2d 825, 826) and it is on this technical conflict that petitioners place sole reliance (Pet. 5).[2] We submit, however, that no necessity exists to resolve the conflict with the *Wettre* decision or to review again the petition's single and narrow question, *i.e.*, whether administrative remedies, prescribed by statute, must be exhausted before court relief may be sought.

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[2] That the conflict may be illusory is indicated by *Fischer* v. *Haeberle*, 80 F. Supp. 652 (E.D.N.Y.), where the *Wettre* holding is limited to the situation where no steps have been taken to initiate the administrative remedy. But cf. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 767.

1. The First Circuit's decision, unlike that of the court below, is "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *S. E. C.* v. *Otis and Co.*, 338 U. S. 843 (summarily decided, on the basis of the previous cases, at the time of granting of certiorari). The cited cases are not distinguished nor even mentioned in the *Wettre* discussion of the administrative remedy exhaustion issue.[3] Indeed, the First

[3] To justify its departure from the exhaustion rule, the Court of Appeals relied solely on a statement in *Order of Conductors* v. *Pitney*, 326 U. S. 561, 566, to the effect that equity may intervene to ward off the "sacrifice or obliteration of a right which Congress * * * created." 168 F. 2d 825, 826; Pet. 28. However, the quoted language, as is apparent from this Court's opinion in the case in which it was first used, was simply a restatement of the proposition that an equity court may grant relief where but for its general equity jurisdiction "there would be no remedy to enforce the statutory commands which Congress had written." *Switchmen's Union* v. *Board*, 320 U. S. 297, 300. In the instant case, a statutory remedy is expressly created by Section 14 of the Veterans Preference Act of 1944 (Appendix, *infra*, pp. 12-13), and there is no contention here that that administrative remedy is inadequate to effectuate the purpose of the Act. See *infra*, p. 7, fn. 4. Moreover, it is significant to note that the *Pitney* case itself fully applied the exhaustion rule and, as recently pointed out by this Court, actually held that a federal district court was not empowered to adjudicate initially a jurisdictional dispute between two unions "but should have left this question for determination by the

Circuit's ruling on that aspect of the case is so radical a departure from the principles reiterated in the cited cases, that it may be expected that that Court of Appeals will itself correct its holding. Should it fail to do so in any future veteran's demotion case, review can be sought at the instance of the Government.

Obvious considerations of orderly procedure, upon which the rule rests, require that matters within the jurisdiction of an administrative body be determined by it before the courts will act. Otherwise, a situation would be created where various phases of the same case would be pending before the Commission and the courts at one time. The instant case is illustrative. Petitioners, after being notified of the available administrative remedy prescribed by statute, took appeals to the Civil Service Commission. While these appeals were pending, they filed the instant suit in the District Court. Such premature interference with the administrative process can be avoided only by requiring petitioners to exhaust their remedies before the Civil Service Commission. In imposing that requirement, the decision of the court below, in contrast with the *Wettre* decision, makes possible the orderly and effective determination by administrative bodies of matters within their jurisdiction.

[National Railway] Adjustment Board, a congressionally designated agency peculiarly competent in this field." *Slocum* v. *Delaware, L. & W. R. Co.*, No. 391, this Term, slip opinion, p. 5.

In urging the nonapplicability of the exhaustion rule, petitioners do not, and cannot, here contend that the administrative remedy available to them is inadequate.[4] Instead, they argue that a failure to follow that rule is justified here inasmuch as "nothing would be gained by the exercise of the right of appeal [*i.e.*, to the Commission], because finally the petitioners would be entitled to a judgment restoring them to the positions from which they had been reduced" (Pet. 23). But, if the rule could be ignored whenever a complainant felt that a court would ultimately adopt his interpretation of a statutory provision, it is obvious that the rule would be meaningless. In addition, the argument overlooks the very basis of the exhaustion rule—the need for giving the Commission an opportunity for determining for itself whether petitioner's interpretation is the proper one and whether he is entitled to relief on the basis of that interpretation. Even if it be assumed that respondents (the Secretary of Defense and the Secretary of the Navy) acted, as petitioners allege, in "utter defiance" of their veterans' preference rights, no justification

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[4] Section 14 of the Veterans' Preference Act of 1944 (Appendix, *infra*, pp. 12-13) authorizes the Civil Service Commission to make recommendations to the agency involved and makes it "mandatory for [the] administrative officer [of that agency] to take such corrective action as the Commission finally recommends." 5 U.S.C. 863; 5 C.F.R. 22.11(f) (1949 ed.). Thus, the Commission is empowered to direct the granting of the relief for which petitioners brought suit—to reinstate them to the positions from which they were demoted.

exists for petitioners' failure to exhaust their administrative remedies before the Commission (Pet. 21).[5] The Commission may very well have found

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[5] *Work* v. *Louisiana*, 269 U. S. 250, relied on by petitioners (Pet. 21, 23), does not justify their failure to exhaust their administrative remedies. In that case, the Commissioner of the General Land Office required a State, applying for a patent to certain "swamp and overflowed" lands under a federal act, to show that those lands were non-mineral in character. The State, alleging that the act authorized the patenting of mineral as well as non-mineral lands and that the requirement of the non-mineral showing was therefore illegal, appealed to the Secretary of the Interior, who affirmed the Commissioner's decision. Later, the Secretary, on a motion by the State for rehearing, adhered to his ruling. The State, in order to avoid the necessity for attempting to make this non-mineral showing, then filed suit, asserting that it had "completely exhausted its rights of appeal and petition before the Department of the Interior, and that its only remaining remedy is by appropriate appeal to the courts." See Transcript of Record, p. 4, in the *Work* case, No. 5, October Term, 1925. The Government's motion to dismiss, despite petitioners' statement to the contrary (Pet. 21), in no way denied the exhaustion of administrative remedies, but was based in part on the ground that the Secretary's decision was nonreviewable by the court. See Transcript, *supra*, at pp. 28-29. This motion was overruled, and the Secretary was ordered to vacate the decisions requiring the non-mineral showing, and enjoined from taking any action except issuing title to the State. The Court of Appeals and this Court affirmed. However, this Court ruled that in so far as the injunction also "requires the Secretary to recognize that the State has already established its right to the lands" it "is plainly erroneous" for the reason that the Secretary "has not as yet determined that they were swamp and overflowed lands * * * and he may not be restrained from investigating and determining this in any appropriate manner." 269 U. S. 250, 261. In other words, to the extent that the State's administrative remedies had been exhausted [*i.e.*, on the requirement for a non-mineral showing], the injunction was upheld; to the extent that it dealt with matters as to which the Secretary had not yet had an opportunity to make any determination [*i.e.*, with respect to the swamp or overflowed character of the land], the injunction was reversed. It is obvious, therefore, that the *Work* case actually supports the rule requiring

petitioners entitled to the jobs from which they were demoted and then ordered the necessary corrective action.[6] And certainly the possibility of the Commission's disagreement with petitioners' views does not, as pointed out by the court below, "create an exception" to the exhaustion rule (R. 70). Whether the Commission is right or wrong in the result it reaches, the decision was clearly one for it to make in the first instance.

Equally untenable is petitioners' assertion that the exhaustion rule is limited to situations where the problem before the administrative agency is factual in nature and that it should not therefore be applied to the instant case which presents "no issue of fact" (Pet. 27). The case of *F. P. C.* v. *Arkansas Power & Light Co.*, 330 U. S. 802, is dispositive of the alleged limitation on the rule. There the Court of Appeals had refused to permit the Commission first to pass on certain questions on the ground that they were purely legal (156 F. 2d 821, 828), and this Court reversed *per curiam*. See, also *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 544; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, and cases cited.[7]

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exhaustion of administrative remedies and furnishes petitioners in the instant case with no support.

The only other case discussed by petitioners on this point, *Farley* v. *United States*, 92 F. 2d 533 (C.A.D.C.), simply reiterates the rule that a public official may be mandamused to perform a plainly-prescribed, statutory duty—a proposition not in any way involved in the instant case.

[6] See footnote 4, *supra*, p. 7.

[7] Petitioners also argue that the exhaustion rule should not be applied to them because they have no right of administra-

2. The fact that the result in the *Wettre* case was later supported, and that the result in the instant case is similarly supportable, on a ground completely independent of the administrative remedy question, constitutes an additional reason for not resolving the conflict between the First Circuit's decision and the decision below. In the *Wettre* case, the District Judge, after remand of the case by the Court of Appeals, and relying on 28 U.S.C. 1331, dismissed the complaints for lack of jurisdiction because the demoted veterans in that case had made no showing that as to each of them the amount in controversy equals or exceeds $3,000. 81 F. Supp. 590 (D. Mass.). The Court of Appeals for the First Circuit affirmed this dismissal for lack of jurisdiction, stating that the District Court "decision was correct,—indeed, unavoidable and mandatory upon the part of the court. *Insular Police Commission* v. *Lopez,* 1 Cir., 160 F. 2d 673." *Joy* v. *Hague,* 175 F. 2d 395. Certiorari was denied by this Court on November 7, 1949. 338 U. S. 870. The same monetary limitation is applicable to the District Court for the District of Columbia. *Knowles* v. *War Damage Corp.,* 171 F. 2d 15 (C.A. D.C.), certiorari denied, 336 U. S. 914,

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tive appeal (Pet. 26). That this argument is specious is manifested by the fact that petitioners availed themselves of their statutory right to appeal to the Civil Service Commission (R. 56, 70). See, also, the detailed regulations of the Commission governing the procedure on such appeals. 5 C.F.R. 22.1 to 22.11 (1949 ed.).

Application of these considerations to the instant case, where the complaints, like that in the *Wettre* case, contain no showing as to the necessary jurisdictional amounts, makes it clear that the decision of the court below is also supportable on a ground independent of the exhaustion rule. In parallel circumstances, this Court has refused to resolve an "asserted conflict" where, as here, the complaint cannot lead to ultimate recovery. *Brooks* v. *Dewar*, 313 U. S. 354, 360.

CONCLUSION

The decision of the court below is clearly correct and, while in conflict with the first *Wettre* decision, there is no need here to resolve the conflict. The petition should therefore be denied.

Respectfully submitted,

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MAY 1950.

APPENDIX

Section 14 of the Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended, 61 Stat. 723 (5 U. S. C., Supp. II, 863), provides:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That

such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 of this title.

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